FILED
MAY 12 1945
CHARLES ELMORE CROPLEY
CLERK

(13)

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 1149-1150.

UNITED STATES OF AMERICA, PETITIONER,

VS.

DAHNE W. WINEBRENNER AND CORNELIUS G. LOOSE, RESPONDENTS.

BRIEF OF RESPONDENT, CORNELIUS G. LOOSE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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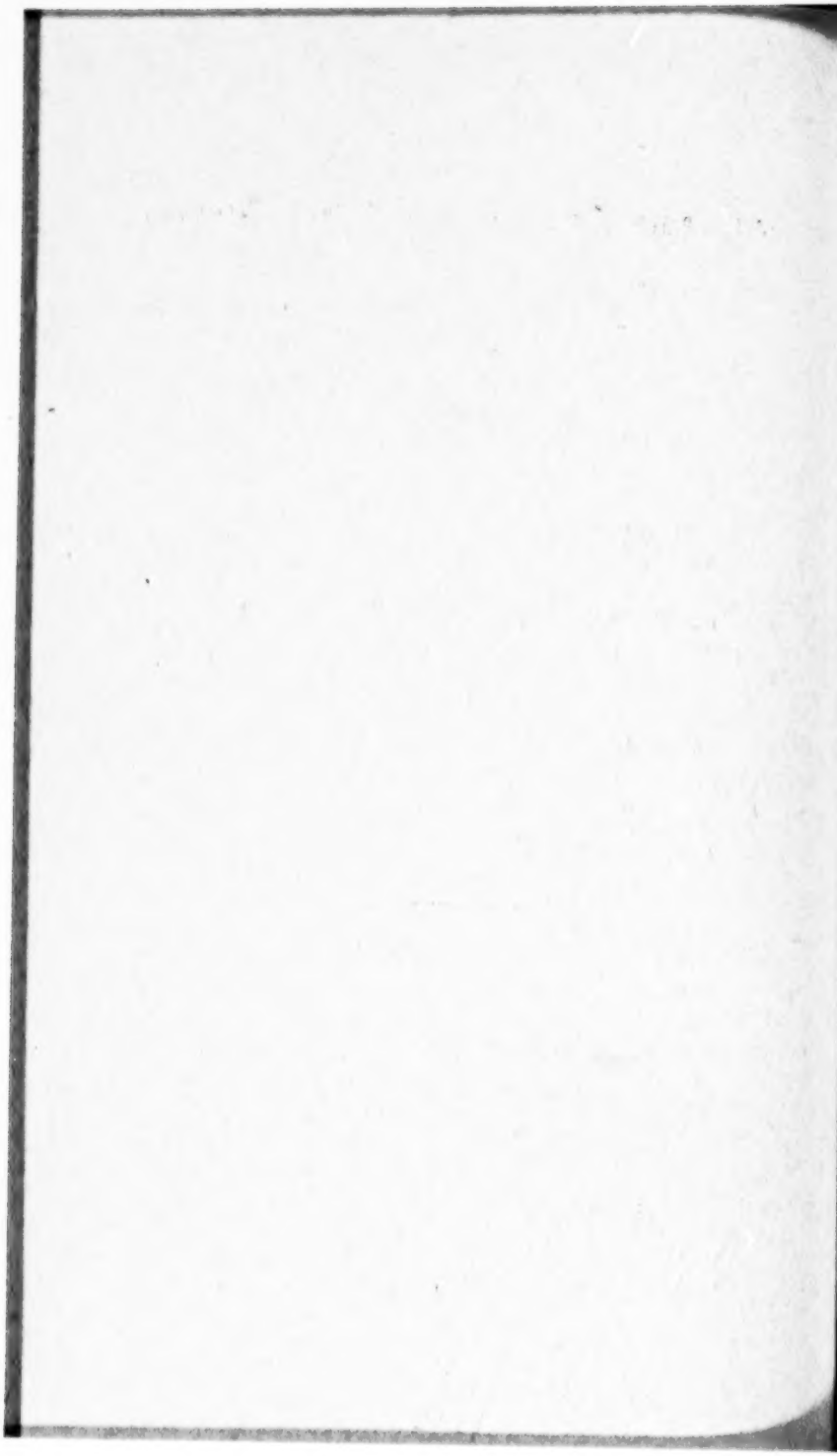

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A.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, sought to be reviewed (R. 2162-2163) is reported in 147 F. 2d 322-330.

B.

JURISDICTION.

The jurisdiction of this Court is sought to be invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925, and under Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

C.

QUESTION PRESENTED.

The alleged question presented (Pet. Br. 2) is not actually presented by the opinion below. The actual question presented is whether the Circuit Court of Appeals for the Eighth Circuit erred in reversing and remanding the cause and in holding that the trial court erred in refusing to admonish the jury that the members thereof should not discuss the cause or the evidence therein among themselves until final submission, and in specifically authorizing the jury to discuss such evidence and to form and express opinions bearing upon the guilt or innocence of respondent with the restriction only that no such opinions should be so positive that no evidence could change them.

D.

STATEMENT.

Respondent was charged, in an indictment returned in the District Court of the United States for the Western District of Missouri, with conspiracy violative of Section 88, U.S.C.A., Title 18, to defraud the United States of its right to have the functions of the United States Army Air Forces at Wright Field, Dayton, Ohio, in the procurement of aircraft equipment, carried on in an efficient, fair, and honest manner, and of its right to the conscientious, faithful, and unbiased services of Cornelius G. Loose, free from corruption, improper influence, bias, fraud, or personal pecuniary interest. The indictment charged that Cornelius

G. Loose was an experienced civilian employee of the Materiel Center at Wright Field, through which the Government was purchasing large amounts of equipment; that his advice and recommendations were relied upon by the military personnel in charge of the purchase of these materials; that Dahne W. Winebrenner, by various means, intentionally exercised such an influence over Loose as to have contracts awarded at unfair prices to persons who would agree to use materials which Winebrenner sold; that Loose did use his position and influence in behalf of such persons as would, and against such persons as would not, use materials which Winebrenner sold, without regard to the merits of such materials.

Respondent was sentenced on December 21, 1943 to imprisonment for a period of two years and to pay a fine of $10,000.00. The appeal of this respondent and the appeal of Dahne W. Winebrenner were consolidated by order of court in the Circuit Court of Appeals. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment because the trial judge failed to instruct the jury that they should not discuss the case among themselves (R. 2153-2160; 147 F. 2d 332, l. c. 326-329), and because the trial court specifically authorized the jury to discuss such evidence and to form and express opinions bearing upon the guilt or innocence of respondent, with the only restriction that such opinions should not be so positive that no evidence could overcome them (R. 368; 147 F. 2d 327). The court below held (R. 2160; 147 F. 2d 329) that the effect of the admonition given in the case, while impossible of ascertainment, violated the principle that an accused is entitled to be heard before he is condemned, and to the essentials of a fair trial. Such decision of the court below is sought to be reviewed here.

E.

ARGUMENT.

I.

The petition should be denied as violative of *paragraph 3* of *Rule 38* of this Court which provides that notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief, be served by the petitioner on counsel for the respondent within ten (10) days after filing. The petition herein was filed April 11, 1945. Respondent, Cornelius G. Loose, was served with notice of filing of petition and with a copy of the petition April 23, 1945. Respondent Loose was not served with a copy of the record until April 26, 1945. Respondent, Dahne W. Winebrenner, has not been served with notice of the filing of the petition, with copy of the petition, or with copy of the record. His counsel has not been served. For failure to make proper service upon both respondents, the petition should be dismissed.

II.

The petition does not state or represent that a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or that it has decided an important question of local law in a way probably in conflict with applicable local decisions; or that it has decided an important question of federal law which has not been, but should be, settled by this Court; or that it has decided a federal question in a way probably in conflict with applicable decisions of this Court; or that it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Circuit Court of Appeals below, in reversing and remanding the cause for the reasons stated in its opinion, was correct. The statement of petitioner that the record does not show the exact terms of the admonition originally given by the trial judge (Pet. Br. 3) is partially correct. The trial court, however, stated that it was "correct" that he had "charged the jury that they should not discuss this case with others but were free to discuss it among themselves" (R. 337). It is not apprehended by respondent here that petitioner asserts that no litigant can complain of any error occurring in the absence of the official reporter however plainly it may be incorporated in the transcript. Moreover, exceptions were taken, not only to the initial admonition but to the subsequent admonition as well (R. 337-340, 368-370). Petitioner states that the admonition was natural, that it represents a realistic approach to the problems of a jury during a long trial. Petitioner seems to assert, contrary to the rule universally followed, that jurors regardless of admonition will discuss the case among themselves and will form opinions, and that the trial judge, "recognizing" that jurors would be thus guilty of misconduct, failed to warn them that such was misconduct but sought to condone such misconduct. If that theory were accepted, it would apply equally to an admonition which permitted jurors to converse with outsiders about the cause, to receive and discuss their opinions, and thereby to import into the jury room all of the prejudices of the locality; we venture to suggest that even the Government would concede that such an admonition would be reversible error.

Petitioner argues that no prejudice was shown. A proper admonition is vital to a fair trial. Judicial error upon the bench, where it occurs, can never be shown affirmatively to affect the result or to have perverted jus-

tice. Where, however, the right of an accused to a hearing under proper procedural rules has been denied, reversible error exists without the requirement of the impossible showing that such denial was a controlling factor in the conviction. It is immaterial whether that denial consists of the exclusion or admission of evidence, or of judicial error, or of an erroneous charge, or of an improper admonition to the jury governing their conduct (*as here*), since in each instance the right of the accused to a fair trial under the law has been infringed. Under such circumstances such an irregularity "raises the presumption that the rights of the appellants were prejudiced", and the burden is cast upon the Government to show that "no injury could have occurred by reason of the irregularity". *Stone* v. *U.S.*, 113 F. 2d 70, l.c. 77. In no case cited by petitioner was an admonition given such as the one given here. The cases cited by petitioner are those wherein jurors without authority viewed the premises. In those cases wherein jurors might have seen newspaper accounts, each case particularly sets out that such jurors testified that they had not read such accounts. Such cases are inapplicable here. The proper rule is expressed by this Court in *Glasser* v. *U.S.*, 315 U.S. 60, 86 L. Ed. 680, l.c. 699.

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote but with sound and advised discretion, with

an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity'."

That it is improper for jurors to form or express opinions is amply demonstrated by *Shippy* v. *Rapid Transit*, (Cal.), 240 Pac. 785, l.c. 787:

"As to the first of these questions we are of the opinion that the action and conduct of the trial judge as above given in detail constituted a serious and prejudicial irregularity occurring during the trial of the cause, and for which a new trial should have been and was properly granted. It is the long-established right of both of the parties thereto to have an opportunity to argue the cause and to have the jury after such argument instructed by the judge of the court as to the law of the case; *and it was equally the duty of the jury under the admonition of the court not to form or express an opinion with respect to the merits of either the facts or the law of the case until the case should be finally submitted to them.*" (Emphasis ours.)

CONCLUSION.

The decision of the Circuit Court of Appeals, sought to be reviewed here insofar as it reverses and remands the cause for the failure of the trial court to give a proper admonition and the error of the trial court in giving an improper admonition, is correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

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